Supreme Court, U.S.
FILED
MAR 18 1998
CLERK

No. 97-1341

In The Supreme Court of the United States

OCTOBER TERM 1997

MONEM KABIR,

Petitioner,

v.

SILICON VALLEY BANK
ROBERT MCMILLAN
MICHAEL HANSEN,

Respondents.

On Petition for Writ of Certiorari to the California State Supreme Court

BRIEF IN OPPOSITION

Stephen J. Kottmeier
Counsel of Record
Hopkins & Carley, A Law Corporation
Ten Almaden Boulevard, 8th Floor
San Jose, California 95113-2228
(408) 286-9800

Counsel for Respondents

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BRIEF IN OPPOSITION TO PETITION

I INTRODUCTION

This brief is submitted by Respondents Silicon Valley Bank ("SVB"), Robert McMillan, and Michael Hansen in opposition to the Petition For Writ of Certiorari ("Petition") in this case. The Petition is replete with misstatements of fact and law. No grounds exist to warrant this Court's review of this private dispute, which should long ago should have ended.

II RESPONSE TO PURPORTED STATEMENT OF THE CASE

Petitioner purports to recite events which occurred beginning in 1990 and concluding in 1997. The jury trial in 1995 lasted sixteen court days and included the testimony of nineteen witnesses. It also included the introduction into evidence of fifty-six exhibits. Ninety pages of jury instructions were given. Petitioner's recitation misstates, mischaracterizes and oversimplifies these years of events.

Major points of error are corrected as follows:

1. In the summer of 1991, SVB through McMillan requested that its borrower USM Technology, Inc. provide to it financial information in accordance with the loan agreements entered into by the parties. USM failed to do so on a timely basis. (Petition, at 5.)

2. In the late summer of 1991, at a meeting of McMillan, Petitioner and Petitioner's co-plaintiff, Petitioner became belligerent and abusive of Mr. McMillan. Testimony regarding this meeting was lengthy and conflicting among the participants.

3. Mr. McMillan did not have a "series of personal conflicts" with Petitioner. Petitioner's co-plaintiff wrote a letter to the president of SVB complaining and with a threatening tone. In response, the president did agree to substitute another loan officer as the loan officer on the USM account. Respondents' assertion is that the belligerency of Petitioner and the threatening letter was an effort to keep SVB from discovering through McMillan the fraud being perpetrated upon it by Petitioner. (Petition, at 5.)

4. Both Mr. McMillan and the majority owner of USM testified that Mr. McMillan did not urge USM to

terminate either Petitioner or his co-plaintiff. The jury found in favor of Respondents on the claims of Petitioner and his co-plaintiff that Respondents SVB and McMillan had allegedly interfered in their employment relations with USM. None of the Respondents made accusations of theft by Petitioner from USM. A cross-complaint for fraud as to SVB was filed in the litigation. (Petition, at 5.)

5. Mr. Won Choe was not an agent of SVB and has never been found by any court to be so. USM was not in receivership from February, 1992. On motion of SVB to the Santa Clara County Superior Court, Jerome Robertson was appointed Receiver for USM in August, 1992. (Petition, at 5-6.)

6. No material "irregularities" existed in SVB documentation for the USM relationship. The material allegations in the 1996 lawsuit filed by Petitioner and his on-going co-plaintiff have been denied. In particular, SVB and its employees did not engage in fraud, conspiracy or intentional interference with contractual relationship. (Petition, at 6.)

7. A temporary restraining order was issued with respect to Petitioner's self-styled newsletters in July, 1995. In addition, a restraining order was issued by the trial judge precluding dissemination of the documents within one mile of the court house during the trial of the case. Finally, in the Fall of 1996, the Santa Clara County Superior Court issued two preliminary injunction orders restraining Petitioner and his colleague from certain activities related to the so-called newsletters. Those last injunctions remain pending as of this writing. (Petition, at 6.)

8. The jury was instructed fully based upon instructions which were jointly submitted by Respondents and Petitioner (through his then attorney of record). No objection was made to the instructions through judgment in the case. No motion for new trial was made. The issue was not raised until Petitioner sought the court's approval of a settled statement in the middle of 1996.

9. The jury in a special verdict found, among other things, that Petitioner had made material misrepresentations to SVB with intent to defraud SVB, but awarded SVB "0" damages. (Petition, at 7.)

10. None of Respondents or the court had prepared a full transcript of the oral proceedings before the trial court. Some limited testimony was transcribed and copies of those transcriptions were purchased by Respondents. Respondents' counsel was advised during the course of trial that Petitioner and his co-plaintiff, through their attorney of record, had also purchased the same partial transcripts. (Petition, at 8.)

11. Petitioner filed a proposed Settled Statement with the trial court. The trial court ultimately held that the proposed statement wholly failed to meet the requirements for a settled statement. Instead, Petitioner's proposal was replete with argument, misstatements and material which was not part of the oral proceedings before the court. In response to Petitioner's proposed Statement, Respondents' counsel struggled with attempting to articulate amendments. Respondents' counsel finally concluded that the only approach which made any sense was to re-write the statement, including verbatim Petitioner's list of issues on appeal, but correctly summarizing the oral proceedings before the court. The trial judge held as follows:

THE COURT: All right. After having spent a considerable period of time reading through all the pleadings and proposals that have been submitted on behalf of both sides, it seems clear to me that I understand the frustration that the defense must have had to try to make heads or tails out of your proposed settled statement, Mr. Kabir. With all due respect. I understand you are not an attorney. And you made an effort to comply with the rules. But the problem with your settled statement is that it's -- it's just -- three-quarters of it is argument. It's just not what the Court or the rules have in mind in terms of a settled statement. And one of the suggestions made by the defense in this case was to simply strike it and leave you to your own devices as to where you go from there.

However, after having reviewed the defendants' document, which is titled "Amendments To Settled Statement," which is really a counter proposal and is a fully engrossed attempt to settle the statement on appeal, I think the defense did a very good job at taking the issues and putting forth a settled statement in the format that is required by the Rules of Court.

> And so the Court is going to adopt as the settled statement what has been denominated as "Proposed Amendments to Settled Statement" with the following changes....

Reporter's Transcript of Proceedings, August 28, 1996, at 28:15-29:14 (Petition, at 8.)

12. Petitioner's characterization of the contents of a letter, which he proposed be added to the appellate record, is incomplete and wrong. (Petition, at 9.)

III LIMITED RESPONSE TO PURPORTED REASONS TO GRANT PETITION

The problem at the heart of this matter is not whether the California rule regarding settled statements denies equal protection to a class of persons. The settled statement procedure is available to any person or case meeting the criteria set forth in California Rule of Court 7. The problem here was that Petitioner failed to comply with the simple requirement of submitting a statement in narrative form of the oral proceedings before the trial court. The failings of what he did submit are detailed in the memorandum submitted to the California trial court at the time. In lieu of striking the statement as a whole, the trial court found the

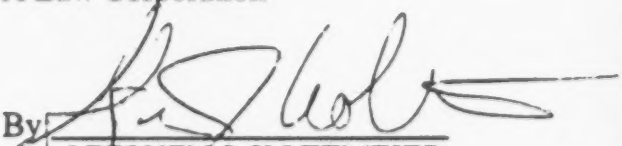
rearticulation supplied by Respondents to be a fair summary of the oral proceedings related to each issue specified by Petitioner.

In fact, the portion of the settled statement prepared by Respondents had no relation to the principal reasons that the California appellate court cited for affirming the judgment. In the opinion attached to the Petition, the court plainly specifies Petitioner's failure to state the two issues he attempted to raise in his appeal in connection with the Settled Statement proceedings. The issues recited in the Settled Statement prepared by Respondents were verbatim the issues included by Petitioner in his proposal for a statement. The problem with the appeal was Petitioner's fault and not that of Respondents or any court. This petition should be denied.

Respectfully submitted,

DATED: March 13, 1998.

HOPKINS & CARLEY
A Law Corporation

By 
STEPHEN J. KOTTMEIER
Attorneys for Respondents